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Supreme Court, U.S.
FILED
FEB 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1120

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.,
Appellant,

v.

THE CITY OF GREELEY, COLORADO,

and

HOME LIGHT AND POWER COMPANY,
Appellee.

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On Appeal from the Supreme Court of the State of Colorado

MOTION OF APPELLEE HOME LIGHT AND POWER COMPANY TO DISMISS

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February 29, 1988

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction of an appeal from a judgment of a state appellate court by a party that, having prevailed in the trial court without the benefit of certain defenses resting on federal statutory and constitutional claims, failed to assert such claims in briefing and arguing the state appeal.

2. Whether a state appellate court violates the due process clause of the Fourteenth Amendment by rendering judgment against a party and thereby necessarily rejecting without adverting to them certain federal statutory constitutional claims that the party has said should be available to it on a remand to the trial court.

3. A state court ruled that, even though a rural electric cooperative had a certificate of public convenience and necessity issued by the state public utilities commission entitling it to render electric service in a certain area, the cooperative must obtain a home rule city's franchise before it expands its service after the city annexed that area. The question is whether that ruling (a) impairs the obligation of a contract in violation of Article I, Section 10, of the United States Constitution, (b) deprives the cooperative of property without due process of law in violation of the Fourteenth Amendment to the Constitution, or (c) is preempted by the federal Rural Electrification Act.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT	2
ARGUMENT	6
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: Page

Allen v. *McCurry*, 449 U.S. 90 (1980) 8
Arkansas Elec. Coop. Corp. v. *Arkansas PSC*, 461 U.S. 375 (1983) 11-12
Beck v. *Washington*, 369 U.S. 541 (1962) 7
Bishop v. *Wood*, 426 U.S. 341 (1976) 14
Board of Regents v. *Roth*, 408 U.S. 564 (1972) 14
Cardinale v. *Louisiana*, 394 U.S. 437 (1969) 10
City of Englewood v. *Mountain States Tel. & Tel. Co.*, 163 Colo. 400, 431 P.2d 40 (1967) 4, 5, 13-14
Cleveland Bd. of Educ. v. *Loudermill*, 470 U.S. 532 (1985) 14
Colorado Postal Tel. Co. v. *City of Colorado Springs*, 61 Colo. 560, 158 P. 816 (1916) 7
Contes v. *Metros*, 111 Colo. 561, 144 P.2d 782 (1944) 7
Forbes v. *State Council of Virginia*, 216 U.S. 396 (1910) 11
Frost v. *Corporation Comm'n*, 278 U.S. 515 (1929) 14
Irving Trust Co. v. *Day*, 314 U.S. 556 (1942) 12
McCorquodale v. *Texas*, 211 U.S. 432 (1908) 12
Merkowitz v. *Mahoney*, 121 Colo. 38, 215 P.2d 317 (1949) 7
New York ex rel. Bryant v. *Zimmerman*, 278 U.S. 63 (1928) 9
Public Serv. Co. v. *PUC*, 174 Colo. 231, 483 P.2d 1337 (1971) 10
Public Serv. Co. v. *PUC*, 174 Colo. 470, 485 P.2d 123 (1971) 10
Public Util. Dist. No. 1 v. *United States*, 417 F.2d 200 (9th Cir. 1969) 12
Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120 (1945) 11
Russell v. *Sebastian*, 233 U.S. 195 (1914) 13
Wells v. *Premier Indus. Corp.*, 691 P.2d 765 (Colo. App. 1984) 4
Western Colo. Power Co. v. *PUC*, 163 Colo. 61, 428 P.2d 922 (1967) 10

TABLE OF AUTHORITIES—Continued

	Page
Federal Constitutional Provisions:	
Art. I, § 10	9, 12
Fourteenth Amendment	10, 14
Federal Statutes:	
28 U.S.C. § 1257	6
Rural Electrification Act § 7, 7 U.S.A. § 907	12
Colorado Constitutional Provisions:	
Art. II, § 11	9
Art. XXV	5, 13
Colorado Statutes:	
Colo. Rev. Stat. § 38-5-101	4, 13, 14
Colo. Rev. Stat. § 38-5-108	14
Colorado Court Rules:	
Colo. App. R. 28	8

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Appellees.

On Appeal from the Supreme Court of the State of Colorado

MOTION OF APPELLEE HOME LIGHT AND POWER COMPANY TO DISMISS

Public Service Company of Colorado, the successor by merger to the named appellee Home Light and Power Company,[1] moves to dismiss the appeal on the grounds that (1) this Court lacks jurisdiction because the substantive federal questions stated in the jurisdictional statement (Questions 2, 3 & 4) were not properly preserved on appeal in the state courts and the existence of

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[1] The named appellee Home Light and Power Company was merged into Public Service Company of Colorado on November 1, 1986. Subsidiaries of Public Service Company of Colorado not wholly owned by it are Consolidated Extension Canal Company, The East Boulder Ditch Company, The Hillcrest Ditch & Reservoir Company, Las Animas Consolidated Canal Company, and The United Water Company.

the other question stated (Question 1) is dependent on them, and (2), in any event, the questions stated are so insubstantial as not to require plenary consideration by this Court.

STATEMENT

The Colorado Supreme Court has resolved a question of Colorado law having to do with the respective powers of the state Public Utilities Commission, on the one hand, and a Colorado home rule city on the other. It resolved the question by deciding that an electric utility with a PUC certificate of public convenience and necessity for a certain geographical area cannot expand its service when the area is annexed by a home rule city without obtaining a municipal franchise empowering it to lay its lines along city streets. The decision raises no conceivable federal question, and no federal claim was asserted before the Colorado Supreme Court.

The appellee Home Light and Power Company holds both a certificate of public convenience and necessity from the Colorado Public Utilities Commission and a franchise from the home rule City of Greeley empowering it to provide electric service in Greeley. The franchise, issued in 1968, states that Home Light "shall furnish electric energy within the corporate limits of the city as such limits now exist or may during the term of this franchise be extended." (Jur. St. App. A4.)

Home Light also serves some unincorporated parts of Weld County, in which Greeley is located. So does the appellant Poudre Valley Rural Electric Association, a rural electric cooperative. The two have had disputes over their respective service territories in Weld County. The disputes were litigated before the Public Utilities Commission and in the Colorado courts on review of its decision. The contesting parties then stipulated to a division of some of the disputed service territories. The stipulation was submitted to the PUC and confirmed by it in 1970 in the form of separate territorial certificates

of public convenience and necessity issued to Home Light and Poudre Valley. (*Id.*)

The territory allotted to Poudre Valley included the western edge of a Weld County subdivision known as Highland Park West. The rest of the subdivision was certificated to Home Light. In 1981 Greeley annexed territory to the south and west of the city, including Highland Park West. By that time, Poudre Valley was serving five or six customers in its territory along the western edge of the subdivision. (*Id.* at A5; *see id.* at A23.)

After the annexation, Home Light applied to the PUC for a ruling whether it had the right, because of its Greeley franchise, to serve the newly annexed part of the city, including the area certificated to Poudre Valley. (*Id.* at A29-A33.) The PUC ruled that Poudre Valley and not Home Light had the right to provide service in the area covered by Poudre Valley's certificate. (*Id.* at A34-A39.) Home Light did not seek review of the PUC decision. (*See id.* at A5-A6.)

On May 18, 1982, the Greeley City Council enacted two ordinances. One of them required any electric utility to obtain a city franchise before it could "maintain or install any wires, cables or other equipment . . . over any street, alley, sidewalk or other public place in the city." (*Id.* at A105-A109.) The other called for an election to determine whether a franchise should be awarded to Poudre Valley. The election was necessitated by a provision of the city charter (following the mandate of the Colorado Constitution as it then read) prohibiting the city from awarding a franchise except upon the vote of a majortiy at a special election. (*Id.* at A114-A122.) The special election was held, and the voters disapproved the proposed Poudre Valley franchise by nearly 4 to 1. (*Id.* at A6-A7, A20.)

Greeley then brought suit for declaratory and injunctive relief against Poudre Valley. Home Light intervened as a plaintiff seeking similar relief. Greeley originally sought to prohibit Poudre Valley from continuing to serve its existing customers in the city but later amended its complaint to ask only that Poudre Valley be barred from extending its facilities. (*Id.* at A7-A8.)

The trial court, the Weld County District Court, decided for Poudre Valley. (*Id.* at A21-A28.) According to the Colorado Supreme Court, the trial court "relied exclusively" on the supreme court's decision in *City of Englewood* v. *Mountain States Tel. & Tel. Co.*, 163 Colo. 400, 431 P.2d 40 (1967). (Jur. St. App. A14; *see* Jur. St. 13.) In that case, the supreme court had held that a telephone utility that had received a city franchise and built its service in Englewood on the strength of it need not, in order to continue its service, renew its city franchise when it expired after 20 years because it had acquired a state franchise by taking advantage of a statute, Colo. Rev. Stat. § 38-5-101 (Jur. St. App. A93), authorizing a utility to construct, maintain, and operate its lines along public roads.

Greeley and Home Light appealed. In its brief on appeal Poudre Valley defended the judgment of the trial court both on the ground on which the court had rested its judgment and on the ground, not reached by the trial court, that the lawsuit represented an untimely effort to have review of the PUC decision that Poudre Valley could serve the part of the newly-annexed area that was certificated to it.[2] Poudre Valley did not, on

[2] We have lodged a copy of Poudre Valley's brief to the Colorado Supreme Court with the Clerk. Its untimeliness argument is at pages 25-29. The Colorado courts, like the federal courts, will sustain a trial-court judgment on any available legal ground even though that ground was not the ground of the trial court's judgment. Wells v. Premier Indus. Corp., 691 P.2d 765, 768 (Colo. App. 1984).

the other hand, attempt to defend the trial court's decision on the ground that a contrary decision would violate the United States Constitution.

The Colorado Supreme Court reversed the district court judgment. The Colorado constitutional provisions and statutes dealing with PUC certificates and municipal franchises that it analyzed demonstrated to its satisfaction that both "municipal and PUC consent are necessary to operate a public utility within a home rule city." (*Id.* at A13.) It added that the PUC was not "empowered to grant a public utility a franchise to use a home rule city's streets, alleys, and public places in the absence of the municipality's consent." (*Id.* at A13-A14.)

The question the court thus decided does not seem a very close one. The court quoted with emphasis from Article XXV of the Colorado Constitution, which empowers the legislature to provide for regulation by the PUC of utility facilities, service, and rates and charges, a proviso that "nothing herein shall affect the power of municipalities . . . to grant franchises." (*Id.* at A11-A12; *see id.* at A122.) As for the *Englewood* case, the court said that the decision there depended solely on the fact that the telephone company had obtained the consent of the city to the use of its streets in the form of the original franchise, and the expiration of the franchise could not affect the continuing ability of the company to serve its customers in the city. (*Id.* at A14-A16.)

The court ruled, in accordance with the limited relief requested by Greeley at trial, that Poudre Valley could maintain and operate its existing facilities, continuing to serve its handful of customers within the enlarged city boundaries, but, in the absence of a municipal franchise, could not extend its facilities. (*Id.* at A18.)[3]

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[3] The supreme court remanded to the district court "for further proceedings consistent with this opinion," but its opinion was explicit that Poudre Valley could not "extend its facilities as they

ARGUMENT

The Colorado Supreme Court has decided a question of state law in a way that disappoints Poudre Valley. That does not make the case a federal case. The supreme court's opinion gives no hint of the presence of any federal question. Understandably so. In briefing the case for the supreme court, Poudre Valley abandoned whatever federal claims it may have included in a wholesale list of defenses that it had formally presented, but never pressed, in the trial court. Abandonment of those claims was prudent. They were, and remain, wholly insubstantial.

The abandoned claims include those covered by Poudre Valley's second, third, and fourth questions presented. The first such question depends on the existence and substantiality of the other three. Because none of its questions was properly preserved, and none is substantial, Poudre Valley's appeal should be dismissed for want of jurisdiction or for want of a substantial federal question.

1. This Court has jurisdiction on appeal from a final decision of the highest court of a state in which a decision could be had "where is drawn in question the validity of" a state statute (which, as Poudre Valley says, includes a city ordinance) "on the ground of its being repugnant" to the Constitution or a federal statute "and the decision is in favor of its validity." 28 U.S.C. § 1257 (2).

The validity of a state statute is not "drawn in question" on a federal ground unless the federal claim of

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existed at the time of the annexation without obtaining a city franchise for that purpose" and seemed to leave no issues open. (Jur. St. App. A18.) We therefore agree with Poudre Valley's implicit assumption that the supreme court's decision is and was meant to be final, so that the district court on remand is required merely to conform its judgment to the supreme court's decision.

invalidity is asserted at the first available opportunity under state law and is preserved, in accordance with state procedures, throughout the proceeding. *See Beck* v. *Washington*, 369 U.S. 541, 549-54 (1962).[4] Here Poudre Valley listed some 51 defenses in its answer to the complaint including some that mentioned the United States Constitution (*see* Jur. St. App. A56-A58), but it did not press any of those federal constitutional defenses in the trial court.

Poudre Valley prevailed in the trial court without the benefit of those defenses. On appeal, as we have said, it defended the trial court's decision on one state law ground that was among its reserved defenses and was therefore not relied on by the trial court. But it did not argue that the trial court's decision was compelled by federal constitutional mandate or urge any of its other reserved claims, federal or state, in support of the trial court's decision. Poudre Valley's brief on appeal made no more mention of the United States Constitution or any of its provisions than does the Colorado Supreme Court's opinion. Poudre Valley gave the supreme court no reason whatever to think that, if it decided the case against Poudre Valley, it would be taxed on an appeal to this Court with so construing a municipal ordinance as to make that ordinance violative, in its application to Poudre Valley, of several federal constitutional provisions. "[I]t is important that state courts be given the first opportunity to consider the applicability of state statutes in light of [federal] constitutional challenge, since the statutes may be construed in a way which saves

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[4] For the necessity, in the Colorado courts, of preserving points on appeal in order to have them considered, *see* Merkowitz v. Mahoney, 121 Colo. 38, 43-44, 215 P.2d 317, 321 (1949); Contes v. Metros, 111 Colo. 561, 565, 144 P.2d 782, 784 (1944). Constitutional claims as well as others are abandoned if not argued. Colorado Postal Tel. Co. v. City of Colorado Springs, 61 Colo. 560, 564, 158 P. 816, 818 (1916).

their constitutionality." *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969). The Colorado Supreme Court was not given that opportunity in this case or given the opportunity to exercise its unquestioned competence, *see Allen* v. *McCurry*, 449 U.S. 90, 105 (1980), to decide the validity of a federal constitutional challenge to the Greeley ordinance.

All that Poudre Valley did to apprise the court below that anything more than what appeared in the body of its brief was afoot was to urge at the tail end of the brief that, if the court were minded to reverse, it should not give judgment for the appellants but should instead remand to allow the trial court to consider certain defenses that were described in an appendix to the brief.[5] The supreme court would have been thoroughly justified in treating this Appendix VI as an attempt to evade Colorado's 30-page limitation on the length of appellate briefs, Colo. App. R. 28(g), and therefore ignoring it. But, even if the court had looked at Poudre Valley's Appendix VI, it would not have found there any federal claim addressed to it. Nor would it have found the federal claims that are embodied in the questions that Poudre Valley now claims entitle it to appeal from the Colorado court's adverse judgment.

a. Appendix VI (which is a reproduction of a trial brief addressed to the trial court) contains a claim that

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[5] What Poudre Valley said at pages 29-30 of its brief in the Colorado Supreme Court is quoted with ellipses at page 2, note 5, of its jurisdictional statement. When the elided words are supplied, Poudre Valley is seen to have been making not the request for a remand to consider unresolved defenses generally that its quotation suggests but instead a request for a remand to consider specifically the defenses set forth in Appendix VI to the brief. Thus, Poudre Valley told the supreme court that the case should be remanded "because of the need for judicial attention to the issues *which are described in Appendix VI hereto* which have not yet been resolved by the District Court." Brief, note 2 *supra*, p. 30 (italicized words dropped in the quotation at Jur. St. 2 n.5).

"the United States of America, through the Rural Electrification Administration, is an indispensable party." That is quite a different claim from the one reflected in Poudre Valley's second question presented here. The claim in this Court is that the Greeley franchise ordinance and the city charter provision requiring an election before a franchise can be issued are preempted by supreme federal law in the form of the Rural Electrification Act.

b. Appendix VI asserts that "[t]he relief requested by the City and Home Light would unconstitutionally impair Poudre Valley's contract with the state and its contract with Home Light." That is absolutely all that was said on the point. No provision of the Federal Constitution—Article I, Section 10, or any other—was mentioned. The Colorado Constitution contains a clause prohibiting the impairment of the obligation of a contract. Colo. Const. Art. II, § 11. An amicus supporting Poudre Valley argued contract impairment to the supreme court under the Colorado Constitution, with reference exclusively to Colorado authorities.[6] If, then, it had consulted Appendix VI at all, the Colorado Supreme Court could fairly have assumed that Poudre Valley likewise had meant to invoke only Section 11 of Article II of the Colorado Constitution in the trial court. *Cf. New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67-69 (1928).

Moreover, even if it were thought that Poudre Valley had by its one-sentence claim of contract impairment effectively sought the protection of Article I, Section 10, of the United States Constitution, the claim as addressed to the trial court in the trial brief and reiterated in the supreme court in Appendix VI was not so phrased as to draw in question the validity of any Greeley enactment. The claim as stated by Poudre Valley runs against the

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[6] *See* Brief of Amicus Curiae The Colorado Rural Electric Association, Colo. Sup. Ct. No. 85-SA-293, pp. 18-19.

"relief requested" by the plaintiffs and not against any state statute or city ordinance. At the very least, then, Poudre Valley has not preserved any such contract-impairment claim as would entitle it to appeal to this Court.

c. Very much the same thing can be said of the only due process claim asserted in Poudre Valley's Appendix VI. Whatever that claim was, it was not a federal claim. Poudre Valley spoke in Appendix VI of "due process problems" without mentioning the Fourtenth Amendment. It quoted the PUC decision on Home Light's application for a declaration of rights. There the Commission had stated a rule of Colorado due process law: that a utility's certificated area is a property right that cannot be taken away from it except by due process of law, and that due process is satisfied only by substantial evidence of the inability or unwillingness of the certificate holder to serve and of the public convenience and necessity requiring a change. The Colorado Supreme Court showed that it was quite aware of this state-law doctrine. It paraphrased the same passage from the PUC decision that Poudre Valley quoted and at another point in its opinion cited a case where it, the court, had enunciated the Colorado due process rule.[7] (Jur. St. App. A5, A12-A13.) The court obviously thought that it was acting consistently with its rule. It was given no reason to think that it was confronted by any federal due process claim.

Moreover, whatever due process claim was stated in Appendix VI was, again, addressed to the relief requested and not to any Greeley ordinance or city charter provi-

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[7] The cited case is Public Serv. Co. v. PUC, 174 Colo. 231, 234, 483 P.2d 1337, 1339 (1971). For other enunciations of the Colorado rule, *see* Public Serv. Co. v. PUC, 174 Colo. 470, 476, 485 P.2d 123, 126 (1971); Western Colo. Power Co. v. PUC, 163 Colo. 61, 68-69, 428 P.2d 922, 926-27 (1967). In none of the cases is any federal authority under the Fourteenth Amendment cited.

sion. Poudre Valley thus has no right of appeal to this Court on any due process claim.

In its petition for rehearing, Poudre Valley attempted to repair its failure to preserve in the Colorado Supreme Court the questions it now purports to present here. (*Id.* at A48-A58.) How adequate its repair job was need not be considered because of this Court's familiar rule that, in general, when a federal question is raised for the first time (or is raised for the first time on appeal) in a petition for rehearing, it comes too late unless the state appellate court actually entertains and rules on the belated federal claim. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128 (1945); *Forbes* v. *State Council of Virginia*, 216 U.S. 396, 399 (1910); *McCorquodale* v. *Texas*, 211 U.S. 432, 437 (1908). The Colorado Supreme Court denied Poudre Valley's petition for rehearing without comment. (Jur. St. App. A43.)

2. If Poudre Valley is thought to have clung by a thin thread to any of its federal claims so as to entitle it to have one or more of them considered on their merits, they have no merit. The Court can properly dispose of them summarily if it believes that any of them are legitimately before it. And, if any of the questions are thought to have been preserved but not to be appeal questions, none of them is substantial or important enough to move the court to exercise its discretionary certiorari jurisdiction.

a. Poudre Valley asserts (Question 2; Jur. St. 17-19) that it cannot be made to obtain a city franchise if it wants to expand its service in West Highlands because its property is mortgaged to the Rural Electrification Administration and the Rural Electrification Act does not allow such treatment of mortgagors under the Act. The Rural Electrification Act does not preempt the power of state and municipal agencies to regulate the service and the rates of rural electric cooperatives that are REA mortgagors. This Court held in *Arkansas Elec. Coop. Corp.* v. *Arkansas PSC*, 461 U.S. 375, 383-89

(1983), that state regulation of wholesale rates charged by a rural electric cooperative was not preempted by the Rural Electrification Act. In doing so, it made clear that its decision applied to the regulation of retail rates as well. *Id.* at 386-87. There is no basis for distinguishing state regulation of the service a rural electric cooperative can provide from state regulation of the retail rates it can charge.

Poudre Valley has subjected itself to Colorado's regulation of its service. It complains here of a particular aspect of the regulation that is not to its liking. But nothing in the Rural Electrification Act says that cooperatives must always win in disputes before state public service commissions or state courts. The analogy Poudre Valley would draw in its preemption argument is farfetched. It has been allowed to continue to serve its existing customers in the City of Greeley but prohibited from expanding its services unless it obtains a municipal franchise. That is nothing like the attempted condemnation of a cooperative's property mortgaged to the REA, which has been held to be forbidden in the absence of REA approval by a reasonable judicial extension of 7 U.S.C. § 907, requiring the REA's approval of the sale of a cooperative's mortgaged property. *Public Util. Dist. No. 1* v. *United States*, 417 F.2d 200 (9th Cir. 1969) (Jur. St. 18).

b. For its claim that Colorado has impaired the obligations of its contracts (Question 3), Poudre Valley relies on two decisions of this Court. (Jur. St. 19-21.) It invokes *Irving Trust Co.* v. *Day*, 314 U.S. 556, 561 (1942), for the statement in that opinion that in a case legitimately arising under Article I, Section 10, "the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court."

It relies on *Russell* v. *Sebastian*, 233 U.S. 195 (1914), for the holding that a gas utility that had begun serving a city when the state constitution allowed it to do so without the city's leave could maintain and expand its service in the city despite a subsequent constitutional amendment enabling the city to require the utility to obtain a franchise and city action pursuant thereto. That is not this case.

Poudre Valley's claimed "contract" with the state is a contract that it asserts was formed when it strung lines along Colorado roads as it was allowed to do by Section 38-5-101 of the Colorado Revised Statutes. It also claims impairment of the obligations of its market-division agreement with Home Light (Jur. St. 28-29), but that agreement is incorporated into its certificate of public convenience and necessity issued by the PUC. If Poudre Valley has any contract with the state, it is that certificate.[8] The certificate is subject to the proviso of Article XXV of the Colorado Constitution. The proviso said, and says, in so many words that the powers of the PUC, including its power to issue such certificates, do not affect the power of municipalities "to grant franchises." (*See* p. 5, *supra*.) The words are so plain that, if this Court were to make an independent examination of the "nature and extent of [the] obligation" of that contract, it would be bound to agree with the Colorado Supreme Court that the state's obligation and Poudre Valley's correlative right were limited by Greeley's power to require a franchise.

The reason why Poudre Valley relies on the statute allowing it to string its lines along roads (described as an offer accepted by its act of stringing the lines) is that the statute was held in the *Englewood* case (p. 4, *supra*)

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[8] The contract-impairment argument that Poudre Valley's supporting amicus made under the Colorado Constitution (*see* p. 9 n.6, *supra*) concerned the PUC certificate and the agreement with Home Light.

to establish a state franchise that made it unnecessary for the telephone company in that case to renew its city franchise. It is obvious from the more than six pages of argument devoted to it in this section of its jurisdictional statement that Poudre Valley's real quarrel is with the Colorado Supreme Court's having distinguished its *Englewood* precedent. (Jur. St. 23-29.) But the ground of distinction—the phone company's prior city franchise, p. 5, *supra*)—was there all along for all to see. Section 38-5-101, like the PUC's power to issue certificates of public convenience and necessity, is subject to municipal consent when city streets are involved. *See* Colo. Rev. Stat. § 38-5-108 (Jur. St. App. A-93). In the *Englewood* case, consent was obtained in the form of the original franchise; in this case, there has been no municipal consent. A litigant's profession of surprise or even anguish that a precedent has been distinguished instead of being taken as authority for a decision in its favor does not turn a simple state-law decision into an impairment by the state of the obligation of a contract.

c. Poudre Valley's vague and cursorily-stated due process claim (Question 4, Jur. St. 29) is just as easily disposed of. Poudre Valley quotes *Frost* v. *Corporation Comm'n*, 278 U.S. 515, 520 (1929), to the effect that a franchise granted by a state "in consideration of the performance of a public service . . . constitutes a property right within the protection of the Fourteenth Amendment." So much may be acknowledged. But it is familiar and unquestioned law that state law determines the extent of the property right for purposes of the due process clause of the Fourteenth Amendment. *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 538 (1985); *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976); *Board of Regents* v. *Roth*, 408 U.S. 564, 577-78 (1972). And here the Colorado Supreme Court has decided that, in the absence of a municipal franchise, Poudre Valley's property right in the annexed area of Greeley was limited to the right to continue serving its existing customers.

3. There is, finally, Poudre Valley's claim, which by its acknowledgement is not a claim that justifies an appeal, that it was deprived of something without due process of law because the Colorado Supreme Court neither expressly passed on certain of Poudre Valley's defenses itself nor remanded the case to the trial court for consideration of them. (Question 1, Jur. St. 15-16.) We leave to one side whether any of those defenses were sufficiently brought to the supreme court's attention to charge it with knowledge of them. For, in the end, Poudre Valley's complaint is that the Colorado Supreme Court ruled against it silently on those defenses (just as it did with respect to the claim of untimeliness that Poudre Valley argued and the state contract-impairment claim that an amicus presented).

Poudre Valley cannot assert that the case had to be returned to the trial court for the taking of evidence on its defenses. There had already been a six-day trial. (Jur. St. 13.) The defenses presented questions of law that the supreme court was as well equipped as the trial court to answer. We have seen how insubstantial are even what Poudre Valley apparently considers the most cogent of its federal defenses. It is not a ground for review in this Court that a state's highest court did not think it necessary to comment on such flimsy claims.

CONCLUSION

The appeal should be dismissed either for want of jurisdiction or for want of a substantial federal question. If it is dismissed for want of jurisdiction on appeal (as opposed to want of jurisdiction to review at all) and the jurisdictional statement is treated as a petition for certiorari, certiorari should be denied.

Respectfully submitted,

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February 29, 1988